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No. 84-1833

Supreme Court, U.S.
FILED
JUL 26 1985
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL DRAPE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the evidence was insufficient to support his conviction for perjury.

1. Following a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted of making false declarations before a grand jury, in violation of 18 U.S.C. 1623. He was sentenced to one year's imprisonment, all but five months of which was suspended, to be followed upon his release from confinement by three years' probation. He was also fined $1,000. The court of appeals affirmed (Pet. App. A8-A14).

a. The evidence, which is summarized in the opinion of the court of appeals (Pet. App. A9-A11), showed that on December 1, 1981, IRS Agent Michael Wamser informed James Duardi that he was being investigated for evading the federal income tax laws and for failing to file income tax returns for the years 1978, 1979, and 1980. Duardi told

Agent Wamser that those returns had been prepared and filed by petitioner, who was Duardi's attorney and bookkeeper (*id.* at A9). Later that day, Agent Wamser and another IRS agent met with petitioner at his law office. After being told the purpose of the agents' visit, petitioner stated that Duardi's 1978, 1979, and 1980 income tax returns had been timely prepared and filed, and he agreed to obtain copies of the returns for the agents. On December 18, Agent Wamser received one copy of each of Duardi's tax returns for 1978, 1979, and 1980 from petitioner (GX 1). Three months later, Agent Wamser received another set of Duardi's tax returns from petitioner. This set was identical to the first one except that the second set was labelled "March set" and had social security numbers typed into the appropriate boxes on the returns (Pet. App. A9-A10; GX 2).

On April 9, 1982, petitioner asked Agent Wamser if he could have the copies of Duardi's 1978 and 1979 returns that he had provided to the agent, because he had misplaced his own copies. Agent Wamser copied the "March set" of the returns and sent the copies that he had made to petitioner (Pet. App. A10; GX 4).

On July 14, 1982, petitioner testified before a federal grand jury that he believed that the 1978 and 1979 returns were prepared and filed on time, even though he acknowledged that he had failed to file Duardi's 1980 return on time. Petitioner also testified that he had copied the 1978 and 1979 returns in 1979 and 1980, respectively, at the time that he filed Duardi's returns, and he stated that he had mailed those copies to Agent Wamser (Pet. App. A10).*

At petitioner's trial on the perjury charge, James Davidson, a documents examiner, testified that petitioner had made the photocopies of Duardi's returns on a copy

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*Petitioner's grand jury testimony is excerpted in pertinent part in the indictment (Pet. App. A2-A6).

machine at the public library across the street from petitioner's office (Pet. App. A10). According to library records, the copies were made between November 30, 1981, and February 27, 1982 (*id.* at A11). Davidson also testified that the copies that petitioner had provided to Agent Wamser were reproductions of original federal income tax forms attached to Duardi's 1978 and 1979 Missouri state tax returns, which were filed on December 18, 1981, and December 21, 1981, respectively (*ibid.*).

Petitioner admitted at trial that his testimony before the grand jury was false, and he added that he was not confused when he gave those false answers (Pet. App. A11). He claimed, however, that he did not intend to give false testimony, but simply forgot what he had done concerning the tax returns (*ibid.*).

b. The court of appeals affirmed in an unpublished opinion (Pet. App. A8-A14). The court held that the indictment and the grand jury's questions were sufficiently specific to form the basis for a perjury charge (*id.* at A12-A13). The court also held that the testimonial and documentary evidence adduced by the government was sufficient to sustain petitioner's conviction (*id.* at A13-A14).

2. Petitioner contends that the evidence was insufficient to support his perjury conviction in three respects. First, he claims (Pet. 6-10) that his answers to the questions were literally true, even if unresponsive. Second, he maintains (Pet. 10-11) that the questions propounded by the grand jury were insufficiently precise. And, finally, he argues (Pet. 12-14) that the government failed to prove that the copies of the 1978 and 1979 tax returns were in fact made between December 7, 1981, and February 27, 1982, as alleged in the indictment. However, both the district court and the court of appeals found that the evidence was sufficient to support petitioner's conviction. Given these concurrent findings by

the lower courts, review by this Court of petitioner's fact-bound claims is unwarranted. See, *e.g., United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 8. In any event, petitioner's contentions lack merit.

a. Petitioner claims that his grand jury testimony was literally true and was, at most, unresponsive to the questions asked. Petitioner did not assert this claim before the court of appeals, however, and he therefore may not raise it here. See, *e.g., United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, petitioner's claim is insubstantial. In *Bronston* v. *United States*, 409 U.S. 352 (1973), the Court held that literally true but unresponsive answers may not serve as the basis of a perjury prosecution. But *Bronston* is not applicable to this case. In arguing that his answers were literally true, petitioner isolates one brief exchange from his grand jury testimony (Pet. App. A4):

> Q: That's your claim that this xerox then was made in the early part of '79 when the return was forwarded?
>
> A: It's my claim that I made a xerox—

However, petitioner later gave affirmative answers in response to the prosecutor's questions asking whether the copies that he had provided to Agent Wamser were made by him when the returns were allegedly filed in 1979 and 1980 (*id.* at A4-A5). The indictment alleged that these answers —which in no sense can be characterized as literally true —were false, not the answer upon which petitioner relies (see Pet. App. A6-A7 (quoting indictment)), and petitioner does not claim that these answers were correct, literally or otherwise. Indeed, petitioner's current claim that his testimony was literally true is directly contrary to his admission at trial that his testimony was false (see Pet. App. A11). Accordingly, petitioner's claim must fail.

b. The courts below correctly held that the grand jury questions were " 'sufficiently clear and precise to form the basis for the perjury charge' " (Pet. App. A12 (quoting district court's opinion)). Petitioner was initially questioned about whether he brought with him, as the subpoena commanded, all copies of the 1978 and 1979 tax returns (Pet. App. A3). Petitioner answered, "I have them" (*ibid.*). The ensuing questions clarified the fact that the copies petitioner had in his possession were either copies that he had made or copies that Agent Wamser had made from those copies and later returned to petitioner (*id.* at A4). Petitioner was then questioned about the copies of the 1978 and 1979 returns in the following manner (*id.* at A4-A5):

Q: So assuming that Mr. Wamser doesn't have the original or that Mr. Wamser gave you back what you gave him, then this is a copy that was made when you sent it in?

A: Yes.

Q: Of the original and when you prepared it and sent it in in January of '79?

A: Yes.

Q. And likewise on the '79 return, if this is a copy of what Mr. Wamser returned to you, then this is a copy that would have been made in January or the early part of 1980 when this return was sent in and, likewise, the '80 return would have been prepared and sent in the early part of 1981 and this is a copy of that document?

A: Yes.

Petitioner does not explain how he misunderstood these questions, which clearly asked whether he had made the copies when he had allegedly filed the returns. Indeed, petitioner admitted at trial that he was not confused by the

questions; his defense was that the false answers were the result of forgetfulness (Pet. App. A11). It is well settled that the defendant's understanding of the questions in a perjury case is a matter for the jury. See, *e.g.*, *United States* v. *Williams*, 552 F.2d 226, 229 (8th Cir. 1977); *United States* v. *Parr*, 516 F.2d 458, 470 (5th Cir. 1975). Here, the jury was properly instructed that petitioner should be acquitted if it found that he gave the false answers for some innocent reason, such as mistake or accident (2 Tr. 60). Further review of the jury's finding that petitioner understood the questions when he answered them is unwarranted.

c. Finally, petitioner contends (Pet. 12-14) that the government failed to prove that he made the copies of the tax returns between December 7, 1981, and February 27, 1982, as the indictment alleged. To be sure, James Davidson, the government's expert witness, testified that the copies were made between November 30, 1981, and February 27, 1982 (Pet. App. A10-A11); accordingly, there is a slight discrepancy between the dates alleged in the indictment and proven at trial. But that discrepancy is immaterial in this case. It is well settled that a minor discrepancy between the dates alleged in an indictment and the evidence adduced at trial is not fatal where, as here, no substantial rights of the defendant have been prejudiced. See, *e.g.*, *United States* v. *Ward*, 676 F.2d 94, 96 (4th Cir.), cert. denied, 459 U.S. 835 (1982); *United States* v. *Grapp*, 653 F.2d 189, 195 (5th Cir. 1981); *United States* v. *Powell*, 564 F.2d 256, 259 (8th Cir. 1977), cert. denied, 435 U.S. 904 (1978); *Russell* v. *United States*, 429 F.2d 237, 238 (5th Cir. 1970). In this case, it is immaterial whether the copies were made between November 30 and December 7 or after December 7 because the ultimate conclusion is the same: petitioner's testimony that he made the copies when the returns were allegedly filed in 1979 and 1980 was false, as petitioner himself admitted at trial (Pet. App. A11). Petitioner's objection is thus beside the point.

Petitioner also criticizes (Pet. 14) Davidson's failure precisely to identify the date when the copies of the tax returns that petitioner brought with him to the grand jury (GX 4) were made. However, Agent Wamser made those copies and sent them to petitioner after petitioner had asked the agent for them. The date of their creation was altogether irrelevant to any issue in the case because petitioner was alleged to have lied only about the dates of the copies that he had made himself (GX 1, 2). In any event, to the extent that the date that Agent Wamser copied the returns that were originally provided by petitioner was in any way germane, Agent Wamser testified that he made the copies on the same day that petitioner had asked for them, April 9, 1982 (1 Tr. 68).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

JULY 1985

DOJ-1985-07